DR SOON TIONG KIONG

v.

PP

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL APPEAL NO: 41-236-98]
8 MAY 2002

CRIMINAL LAW: *Poisons (Psychotropic Substances) Regulations 1989 - Regulation 24(1) - Storing psychotropic drugs in unlocked cabinet - Whether locking consultation room in which cabinet was placed was sufficient - Whether consultation room was indeed locked - Dispensation of medicine by clinic assistant - Whether medical practitioner rightly convicted - Poisons Act 1952*

CRIMINAL PROCEDURE: *Judgment - Double judgment - Oral decision followed by written judgment - Whether amounted to double judgment - Signed copy of the grounds of decision in the case - Criminal Procedure Code, s. 307(3)*

The defendant, a registered medical practitioner, was charged with the following offences: (1) supplying 12 tablets of Erythromycin to a certain person through his clinic assistant in contravention of ss. 13(b), 19(1)(a) and 21(1)(b) of the Poisons Act 1952 ('the Act'); (2) supplying a mixture containing Diphenhydramine and Codeine to a certain person through his clinic assistant in contravention of ss. 13(b), 2(1) and 22(b) of the Act; and (3) storing 14 types of psychotropic substances in an unlocked cabinet in the consultation room in contravention of reg. 24(1) of the Poisons (Psychotropic Substances) Regulations 1989 ('the Regulations') and s. 30(5) of the Act. The magistrate acquitted and discharged the defendant on the first and second charges but convicted and fined him RM1,500 (in default three months imprisonment) on the third charge. The defendant appealed contending: (i) that the magistrate had erred in delivering two judgments, ie, an oral decision (with a certified written transcript) on 16 November 1998 and subsequently a written judgment on 18 December 1998; and (ii) that although the cabinet in which the psychotropic drugs were kept was not locked the consultation room was and, therefore, the defendant could not have contravened reg. 24(1) of the Regulations.

Held:

[1] Once the defendant had taken upon himself the duty of storing the psychotropic drugs inside a cabinet he must keep the cabinet locked. This was so notwithstanding the fact that the consultation room in which the cabinet was placed was locked. The defendant was also unable to explain why his clinic assistant was seated in the consultation room dispensing medicine. The defendant was therefore rightly convicted. (p 7 g & h)

[2] The only judgment that was legally before the instant court was the written judgment of the magistrate dated 18 December 1998. That was the "signed copy of the grounds of decision in the case" as envisaged by s. 307(3) of the Criminal Procedure Code. (p 9 c)

[Appeal dismissed.]

Legislation referred to:
Criminal Procedure Code, s. 307(3)
Poisons Act 1952, s. 19(1)(a)
Poisons List Order 1993, items 43, 432
Poisons List Order 1992, item 45
Poisons (Psychotropic Substances) Regulations 1989, regs. 3(2)(b), 24(1)

For the appellant - Karpal Singh; M/s PS Ranjan & Co
For the respondent - Azman Abu Hassan DPP

Reported by Gan Peng Chiang

JUDGMENT

RK Nathan J:

Facts

The defendant was at all material times a registered medical doctor licenced to practice medicine in Malaysia. He was charged with three counts. They read as follows:

Pertuduhan Pertama

Bahawa kamu pada 14/6/1993 lebih kurang jam 7 malam di Klinik M C Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak Air Itam di dalam Daerah Timur Laut di dalam negeri Pulau Pinang, sebagai tuan punya Klinik tersebut, telah didapati membekalkan, melalui seorang pekerja bernama A.H. Kamal Ahmad, sejenis racun berjadual (Bahagian 1 Kumpulan B) kepada seorang yang bernama Muhammad Nasir bin Ahmad No. K/P 5909920, yang tidak dibekalkan oleh seorang pengamal perubatan berdaftar seperti dikehendaki dibawah seksyen 21(1)(b), dibaca bersama dengan seksyen 19(1)(a), Akta Racun 1952 yakni:

Satu paket plastik mengandungi 12 tablets oren mengandungi Erythromycin iaitu sejenis antibiotik (perkara 43 di bawah Perintah Senarai Racun 1993).

Dengan ini kamu telah melanggar seksyen 21(1)(b) dibaca bersama seksyen 19(1)(a) Akta Racun 1952, satu kesalahan dibawah seksyen 13(b) dan boleh dihukum dibawah seksyen 32(2), Akta yang sama.

PERTUDUHAN KEDUA

Bahawa kamu pada 14/6/1993 lebih kurang jam 7 malam di Klinik M.C. Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak, Air Itam di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai tuanpunya Klinik tersebut, telah didapati membekalkan melalui seorang pekerja bernama A.H. Kamal Ahmed, sejenis racun berjadual (Bahagian 1 Kumpulan C), kepada seorang yang bernama Muhammad Nasir bin Ahmad No. K/P 5909920, yang tidak dibekalkan sebagai ubat dispens oleh seorang pengawal perubatan berdaftar seperti dikehendaki di bawah seksyen 22(b), dibaca bersama dengan seksyen 2(1), Akta Racun 1952 yakni:

Satu botol plastik mengandungi cecair perang gelap mengandungi Diphenhydramine, suatu antihistamine (perkara 45 dibawah Perintah Senarai Racun 1992) dan Codeine yaitu sejenis narkotik (perkara 432, di bawah Perintah Senarai Racun 1993).

Dengan ini kamu melanggar seksyen 22(b) dibaca bersama seksyen 2(1) Akta Racun 1952, satu kesalahan di bawah seksyen 13(b) dan boleh dihukum di bawah seksyen 32(2), Akta yang sama.

PERTUDUHAN KETIGA

Bahawa kamu pada 14/6/1993 lebih kurang jam 7 malam di Klinik M.C. Yoko Cawangan Lee Klinik beralamat 7-G Rifle Court, Jalan Padang Tembak Air Itam di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, sebagai pengamal perubatan berdaftar yang diberi kuasa dibawah peruntukan 3(2)(b) Peraturan-peraturan Racun (Bahan-bahan Psikotropik) 1989 PU(A)66; telah didapati menyimpan bahan-bahan psikotropik dalam kabinet yang tidak berkunci yang terletak didalam bilik doktor didalam premis tersebut yakni:

14 perkara seperti di lampiran A. Dengan ini kamu telah melanggar peraturan 24(1), Peraturan-peraturan Racun (Bahan-bahan Psikotropik) 1989, satu kesalahan di bawah seksyen 30(5) Akta Racun 1952 dan boleh dihukum di bawah seksyen yang sama.

Lampiran Pertuduhan			Lampiran A		
Bil	Tanda barang	Nama Ubat	Nama Rachun Berjadual	Nombor Senarai Rachun#	Kuantity
1	3	Ativan 0.5 mg	Lorazepam	197	178
2	4	Ativan 0.5 mg	Lorazepam	197	144
3	5	Dormicum 15 mg	Midazolam	197	80
4	6	Spasril	Chloridiazepoxide	197	262
5	7	Dormicum 7.5 mg	Midazolam	197	68
6	8	Somese 0.25 mg	Triazolam	197	100
7	9	Somese 0.25 mg	Triazolam	197	44
8	11	Panbesy	Phentermine	507	225
9	12	Phenoberbitone	Phenoberbitone	57	165
10	13	Clorpo-5 Tablet	Chlordiazepoxide	197	832
11	14	Diazepam tablet 10mg	Diazepam	197	114
12	15	Diazepam tablet 10mg	Diazepam	197	825
13	16	Valium 2	Diazepam	197	35
14	17	Ziazepam 10	Diazepam	197	214

Per: (14) Empat Belas sahaja

At the close of the case for the prosecution the learned magistrate acquitted and discharged the defendant on the 1st and 2nd charges and called upon the defendant to answer the 3rd charge. After the defendant had elected to give his evidence under oath and after hearing lengthy submissions the learned magistrate found the defendant guilty of 3rd charge and sentenced him to a fine of RM1,500 in default three months imprisonment. The defendant having paid the fine and being dissatisfied with the said decision, appealed. At the appeal the defendant was represented by Mr. Karpal Singh. Whilst the previous solicitors for the defendant had filed 23 grounds in their petition, Mr. Karpal in his customary forthrightness and in my view quite correctly too, only proceeded with two grounds namely:

1) that the learned magistrate having given an oral judgment on 16 November 1998 with a certified written transcript being made available, also gave a written judgment on 18 December 1998, thereby making available two judgments;

2) that whilst the cabinet in which the psychotropic drugs were kept was not locked, the consultation room in which the said cabinet and in which the drugs were, was locked and that therefore the defendant had not committed any offence pursuant to reg. 24(1) of the Poisons (Psychotropic Substances) Regulations 1989.

Findings Of This Court

To sustain a conviction under the charge as preferred, the learned magistrate quite correctly set out the four ingredients the prosecution had to prove ie,

1) that the defendant was a registered medical practitioner authorised to keep or store psychotrophic drugs;

2) that Clinic M.C. Yoko Cawangan Lee Klinik of 7-G-l Rifle Court, Jalan Padang Tembak, Air Itam, Penang is the place of practice of the defendant Dr. Soon Tong Kiong (the clinic);

3) that the 14 items listed in Schedule A to the charge are psychotropic drugs;

4) that the defendant had kept or stored the said psychotropic drugs in an unlocked cabinet in the consultation room in the said clinic.

In respect of the first two ingredients the prosecution called Encik Rahim bin Abdul Rahman who at the material time was the Secretary to the Malaysian Medical Council (the M.M.C.). This witness tendered to court exhs. P60 A and B which was the Government Gazette Jil. 37 No. 15 and dated 29 July 1993 which said Gazette stated the defendant as the sole practitioner at the clinic. The prosecution also tendered through the investigating officer the practicing certificate issued to the defendant by the M.M.C. for the relevant period between 1 January 1993 to 31 December 1993 and this certificate stated that the defendant's main practice was at the clinic. Once this was estabished, then pursuant to reg. 3(2)(b) the defendant is authorised to be in possession of psychotropic drugs.

It is pertinent to set out the relevant regulations relating to the charge under the Poisons (Psychotropic Substances) Regulations 1989.

Regulation 3 reads as follows:

3.(1) No person shall have in his possession any psychotrophic substance unless:

(a) he is authorised to be in possession of such psychotropic substance under these Regulations; and

(b) the psychotropic substance in his possession is:

(i) for a lawful purpose; and

(ii) obtained in accordance with the provisions of these Regulations

(2) For the purposes of paragraph (a) of subregulation (1), the following persons or class of persons shall be authorised to be in possession of psychotropic substance:

(a) xxx

(b) a registered medical practitioner;

(c) - (k) xxx

(l) a person lawfully supplied with such psychotropic substance:

(i) by a registered medical practitioner, registered dentist Division 1 or a veterinary surgeon; or

(ii) in accordance with a prescription lawfully given by a registered medical practitioner, registered dentist Division 1 or a veterinary surgeon;

(m) a person acting on behalf of the class of persons mentioned in paragraph (1);

Regulation 24 reads as follows:

(1) Any person who possesses any psychotropic substance for the purposes of manufacturing, dispensing, compounding, mixing, sale, supply, education, research or chemical analysis, shall store such psychotropic substance in a room, cabinet, safe or receptacle which shall remain locked except in so far as may necessary to have such room, cabinet, safe or receptacle opened in order to:

(a) carry out the purposes described above in connection with the psychotropic substance stored therein;

(b) keep other psychotropic substance in such room, cabinet safe or receptacle; or

(c) conduct a stock check of the psychotropic substance stored therein.

(2) Any room, cabinet, safe or receptacle used to store any psychotropic substance shall only be locked and unlocked by the person authorised to possess such psychotropic substance and the keys to such room, cabinet, safe or receptacle shall be kept by him only.

(3) For the purposes of this regulation, any room, cabinet, safe or receptacle used for storing any psychotropic substance shall be so constructed and with reasonably sufficient security measures in order to prevent theft or diversion of the psychotropic substance stored therein.

Corrigendum

Poisons Act 1952
Poisons (Psychotropic Substances) Regulations 1989.

In PU(A) 66 published on 2 March 1989, substitute for the words "(1)" appearing in sub-para. 3(2)(m) the words "(l)".

(KK(S)-484 SK-10 Bhg.3; PN.(PU^2)172/V.)

On the third issue as to whether the 14 items listed in Lampiran A accompanying the charge were psychotropic drugs, the evidence of SP4, the Government Chemist, established without challenge that the items stated in Schedule A are substances falling within the items listed under the Poisons List Order 1993 of the Poisons Act 1952.

On the fourth issue it was Mr. Karpal's contention that whilst the cabinet in which the said drugs were kept was not locked as the lock was spoilt, yet the consultation room in which the cabinet was, was locked, because the defendant had testified that when he left for the day he had locked his room.

The relevant regulation to consider with regard to this submission is reg. 24(2). It states quite clearly that "any room, cabinet, safe or receptacle used to store any psychotropic substance shall only be locked and unlocked by the person authorised ...". The important word here is the disjunctive 'or'. This means that the defendant would have been quite at liberty to have shown that the said drugs were kept in the room which was locked and to which he or the person authorised by him, had the key too. However in this case the undisputed evidence was that the drugs were kept in a cabinet and that the lock to the said cabinet was spoilt. Once the defendant had taken upon himself the duty of storing the said drugs inside a cabinet then notwithstanding the fact that the room was locked, it is the duty of the defendant to keep the cabinet locked. In the circumstances since the cabinet was not locked the defendant in this case was rightly convicted.

However in this case could it be said that the consultation room was indeed locked. Although the defendant testified that he had a key and his nurse Chan (SP6) had the other key yet when Muhammad Nasir bin Ahmad (SP1), the agent provocateur, was shown into the consultation room by SP6, he met with one A.H. Kamal Ahmad (A.H) who acted as the doctor and who prescribed medication to SP1. The said A.H. however did not attend court.

It is very pertinent to remember that the defence did not deny the existence of A.H. Since A.H. was seated in the consultation room and prescribing medication and acting as a doctor, the learned magistrate was correct in calling upon the defendant to enter his defence and to explain why A.H. was seated in his consultation room. If the said A.H was a doctor registered with the M.M.C. and issued with a practing certificate, then the defendant has a valid defence. When called upon to enter his defence, the defendant's case collapsed like a deck of cards. It was suggested to the investigating officer during cross-examination by the defendant's counsel that the clinic was owned by M.C. Yoko Management Sdn. Bhd. However in his evidence he admitted that the clinic was his principal place of practice in 1993. There were suggestions by the defence counsel that there were other doctors working in the said clinic. However, under cross-examination the defendant admitted that Dr. Soon Thong Khoo and Dr. Soon Thong Oon did not practice in the said clinic as "their proper place of practice".

The defendant admitted that he knew A.H. but denied under oath that the said A.H. was working for him. However the defendant totally failed to explain what A.H. was doing in his own consultation room and dispensing medication to patients. Further when asked why he had left his clinic open after he had locked his room and gone when there was no doctor present, he said that he was contactable at all times.

With such preponderance of evidence and because of the lack of explanation forthcoming from the defendant as to the presence of A.H in his room, which said room was open, and since the cabinet containing the psychotropic drugs were in the unlocked cabinet, the prosecution had clearly proved that a stranger, other than the doctor and his nurse, had access to the said drugs. In the circumstances the doctor was rightly convicted.

The other issue I have to consider is whether there were two judgments in this case. Admittedly, the learned magistrate had delivered an oral decision on 16 November 1998, the day he delivered his verdict. Subsequently he gave a written judgment on 18 December 1998.

The learned deputy public prosecutor referred the court to s. 307(3) of the Criminal Procedure Code (CPC) which reads as follows:

> (3) When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause it to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.

It is clear to me therefore that the only judgment that is legally before the court is the "signed copy of the grounds of decision on the case", and that no doubt is the written judgment of the court dated 18 December 1998. Sometimes courts do, in the interest of justice, like in this case, explain to a party concerned why he had lost the case. Needless to say, whilst this is a noble gesture in that at least the litigant would know why he had lost, yet at times this might act adversely even against the winning party because an appellate court might hold the view that since there are two judgments the appeal ought to be allowed and in a civil case the claim might even be dismissed. However in this case as soon as the learned deputy raised s. 307(3) of the CPC Mr. Karpal Singh with his customary frankness which he is known for, informed the court that he was "not making much of this issue."

I, therefore, dismissed the appeal and upheld the conviction and sentence.